IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1528

AMERICAN AIRLINES, INC.,
TRANS WORLD AIRLINES, INC.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,
THE NATIONAL PASSENGER TRAFFIC ASSOC., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners American Airlines, Inc. and Trans World Airlines, Inc. respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on December 17, 1976.

Judgment Below

The judgment of the Court of Appeals without memorandum is unreported (6a-7a).* The orders of the Court of Appeals denying the petition for rehearing and the suggestion for rehearing *en banc* are unreported (8a-9a). The orders of the Civil Aeronautics Board which the Court of Appeals declined to review appear as Appendix C hereto (10a-75a).*

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* All relevant orders of the Court of Appeals and the Civil Aeronautics Board are reprinted in the Appendix to this petition. Delta Air Lines, Inc. and Eastern Air Lines, Inc. were also petitioners in the court below.

Jurisdiction

The judgment of the Court of Appeals was entered on December 17, 1976. A timely petition for rehearing and a suggestion for rehearing *en banc* were denied by orders entered on February 3, 1977. This petition for writ of certiorari was filed within 90 days of the entry of those orders and is thus timely under 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 49 U.S.C. § 1486(f).

Questions Presented

1. Whether the Court of Appeals lacks jurisdiction to review new and revised ratemaking standards prescribed by the Civil Aeronautics Board without notice and hearing in contravention of statutory requirements* because such new ratemaking standards are encompassed in an order "suspending" proposed fares which were concededly lawful under prior standards established by the agency.

2. Whether the Civil Aeronautics Board may evade judicial review of rate orders by "suspending" instead of "rejecting" fares it holds to be inconsistent with those prescribed by it.

3. Whether the doctrine of "mootness" bars review by the Court of Appeals of new ratemaking standards adopted by the Civil Aeronautics Board in violation of statutory requirements because the particular tariffs which failed to meet the new standards were withdrawn, although such withdrawal was involuntary and although the new standards have continued to be applied on a recurrent basis to subsequent fare proposals.

* Section 1002(d) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1482(d), and 5 U.S.C. § 553 (formerly Section 4(a) of the Administrative Procedure Act).

Statutes Involved

The statutory provisions involved are Sections 1002(d) and (g) and 1006(a) and (f) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1482(d) and (g) and 1486(a) and (f); and 5 U.S.C. § 553 (formerly Section 4(a) of the Administrative Procedure Act). The foregoing statutes are set forth in Appendix A.

Statement of the Case

This case has its roots in a proceeding before the Civil Aeronautics Board ("Board"), known as the *Domestic Passenger Fare Investigation* ("*DPFI*"). That proceeding, which was the broadest-ranging fare investigation in the Board's history, involved extensive hearings and exhibits and lasted some five years. Its objective was to establish long-term ratemaking standards for future general application to proposed changes in domestic air passenger fares.

As a result of the *DPFI*, the Board prescribed a fare formula for the setting of passenger fares—a formula based on the ratemaking standards which had been established. The Board made it clear that such standards were required to be followed by the carriers in their future fare filings and that it had the statutory power to reject any fare filings which were inconsistent with its prescribed standards.

The Board prescribed, to the penny, the basic passenger fares to be charged throughout the contiguous 48 states as of April 29, 1975.

In May 1975 the petitioners filed for fare increases in conformance with the Board's prescribed fare standards based on rising costs, especially for fuel.

The Board conceded that the proposed fare increases met the Board's previously established standards, but nevertheless it "suspended" them through the expedient of adopting an additional new ratemaking standard and of substantively modifying other ratemaking standards* only recently established in the *DPFI* (10a-45a)—all without notice and hearing to the carriers in violation of the Federal Aviation Act, the Administrative Procedure Act and the requirements of due process. These new and modified ratemaking standards disallowed substantially more of the air carriers' actual costs than were disallowed under the existing *DPFI* standards. For the domestic airline industry over *$800,000,000 more in expenses were disallowed* on an annual basis. The Board refused to reconsider its action (46a-62a).

Several months later the Board once again "suspended" fare increases which would have been permissible under its *DPFI* standards, but which exceeded those it considered allowable under the new unlawfully prescribed standards (63a-75a).

Petitioners sought judicial review of the Board's orders which had established the new and revised standards in the Court of Appeals for the District of Columbia Circuit. The Board moved to dismiss the petition for review on

* The new and modified standards are characterized in Board Order 77-6-72 (10a-25a). The Board's initial description acknowledges that it "made an adjustment for aircraft utilization for the first time", "made the full-discount fare adjustment", incorporated a refined belly revenue offset calculation "to reflect annualization of cargo-rate increases as a necessary corollary to the annualization of fare and cost increases," and "refined the cost escalation factor" (13a-14a).

the grounds of nonreviewability and mootness. The Court of Appeals denied the motion, and the case was argued and submitted on the merits. However, the merits of the case were never reached, for the court below dismissed the petition on the grounds of nonreviewability and mootness in a judgment without opinion. A petition for rehearing and suggestion for hearing *en banc* were denied. It is that judgment and those orders which are the subject of this petition for certiorari.

In holding the Board's orders to be nonreviewable the court below implicitly held that the Board's orders were conventional suspension orders and stated that petitioners' case did "not come within the principle announced in *Moss* v. *CAB*, 430 F.2d 891 (D.C. Cir. 1970)" (7a). *Moss* had held that the Board could not use a suspension order as a vehicle to prescribe rates and escape judicial review; it noted that prescribed rates are agency made rates and under the statutory scheme can only be established after notice and hearing. *Moss* pointed out the contrast between such agency made rates and carrier made rates—rates proposed entirely by the carriers. Carrier made rates under the statutory scheme are subject to suspension in order to permit the Board to investigate their lawfulness.

The Board's order which was set aside in *Moss* had "suspended" certain proposed fare increases and then proceeded to fix and prescribe what the Board deemed to be the appropriate fares without notice and hearing. Even though the Board's order was framed in terms of a suspension and even though the court noted that the "Board's suspension authority . . . is totally insulated from judicial review" (430 F.2d at 900), the court reviewed and set aside the order because the suspension power had been misused to fix and prescribe fares. Agency prescribed fares are subject to review.

The court below in holding that petitioners' case did not come within the principles of *Moss* rejected petitioners' contention that the proposed fare increases in issue here were agency made rates and hence not subject to suspension under the statutory scheme. Such holding was made despite the fact that the fare proposals in issue did not represent the carriers' views on what fare increases were needed or were reasonable, but were filed to, and did, conform to the Board's views on fares, as specifically prescribed by its *DPFI* ratemaking standards. In its adoption of new and revised ratemaking standards the Board continued to prescribe and fix rates. Fares which failed to comply with the new and revised prescribed standards were "suspended"; those which complied were permitted to go into effect.

In holding the case to be moot, the court below also rejected petitioners' arguments that, despite the involuntary withdrawal by the petitioners of specific tariffs,* the Board's continued application of its revised and new ratemaking standards to fare proposals made the controversy a concrete, live and real one; and that the question had become a recurrent one which otherwise would escape judicial review.

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* Under the Board's regulations (14 C.F.R. § 221.120) a new tariff increasing fares cannot be filed unless the suspended tariff is withdrawn or granted special permission to remain on file. Such special permission was denied in the case of one of the petitioners. Some smaller fare increases were justified even under the Board's new and revised ratemaking standards. Since fare increases were desperately needed by the airlines, the petitioners had no choice, as a practical matter, but to withdraw their suspended tariffs and file in their place tariffs for the lower increases which the Board would permit. The tariff withdrawals were clearly effected only as a result of economic compulsion.

Reasons for Granting the Writ

1. The Court of Appeals Decided an Important Issue of Federal Law That Should Be Resolved by This Court.

This case involves a basic interpretation of the Civil Aeronautics Board's ratemaking authority, its powers to suspend and prescribe fares and the judicial reviewability of such ratemaking authority. It raises the recurrent question of whether a rate suspension order is totally immune from review in all respects—a question which this Court did not need to reach in *United States* v. *Students Challenging Regulatory Agency Procedure (SCRAP)*, 412 U.S. 669 (1973). The case is of exceptional significance to the statutory scheme for the regulation of air carrier fares and rates under the Federal Aviation Act ("Act") "because a final determination of the questions involved, particularly those involving interpretation of the Act, is of importance for future guidance of the Board in carrying out its congressionally imposed functions", *CAB* v. *State Airlines, Inc.*, 338 U.S. 572, 575 (1950), and for the carriers who will be deprived of their day in court, if the decision below is allowed to stand.

Under the statutory scheme of the Federal Aviation Act, airline fares can be made by the carriers or by the Board after notice and hearing. Carrier made rates are subject to suspension and investigation. Section 1002(g) of the Federal Aviation Act, 49 U.S.C. § 1482(g). The rationale behind the Board's power to suspend carrier made rates is to preserve the *status quo* while affording the Board an opportunity to investigate the lawfulness of the rates. Without such suspension power the public could be subjected to rates as high as the management of the carriers desired.

The statutory scheme for Board made rates is quite different. Under the Act the Board may prescribe the lawful rate after investigation and hearing in accordance with the ratemaking provisions of Section 1002(d) and (e) of the Act. 49 U.S.C. §§ 1482(d) and (e). The prescribed rate is the one "thereafter to be demanded, charged, collected or received" (49 U.S.C. § 1482(d)) by the carrier. Future tariff filings that are inconsistent with the prescribed rates can be rejected. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *United Air Lines, Inc.* v. *CAB*, 518 F.2d 256 (7th Cir. 1975).

No suspension power exists with respect to Board made rates, since the investigation and determination as to the lawfulness of the rates has already been made by the Board. Under Section 1002(d) of the Federal Aviation Act, 49 U.S.C. § 1482(d), the Board can only "determine and prescribe the lawful . . . fare . . . thereafter to be demanded, charged, collected, or received . . ." when it has determined "after notice and hearing" that the existing fares are unlawful.

The Board's orders must be judged in the light of the *DPFI*—the basic purpose of which was the establishment of ratemaking standards for future application. These ratemaking standards are being continually applied to proposed fare changes, as are the new and changed standards, of which petitioners sought judicial review below.

The Board's decision in the *DPFI* also prescribed a fare formula for the setting of passenger fares—a formula that the carriers must follow if their fare filings are going to be permitted to go into effect. It was against this background that the petitioners submitted their fare proposals in issue here.

Petitioners' fare proposals were not the creation of the carriers' managements and did not reflect what the carriers believed was an appropriate fare increase. Instead, they were submitted in precise conformance with the existing *DPFI* standards, as the Board conceded, because they were told in emphatic terms by the Board that such standards would be applied to future tariff filings.

By its adoption of new and changed standards, the Board, of course, continued to prescribe rates. Fares which did not comply with the new and revised standards, as here, were "suspended." Fares which have complied with the new and revised standards have been permitted to go into effect—but at a much lower level than that permitted by the original standards of the *DPFI*. Thus the fares here were clearly Board prescribed, and they were prescribed without notice and hearing in violation of Sections 1002(d) and 1006(e) of the Act. 49 U.S.C. § 1482(d) and 1486(e).

The reluctance of the courts to interfere with agency exercises of suspension power over carrier made rates, as evidenced in *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 548 (1963) and *SCRAP*, *supra*, p. 7, is based on the desirability of permitting the agency with its expertise, and not a court, to first determine the reasonableness and lawfulness of a carrier proposed rate. As this court stated in *SCRAP*, the statute there "vested exclusive power in the Commission to suspend rates pending its final decision on their lawfulness" (412 U.S. at 691) —a power not subject to the injunctive remedy of a court.

No such judicial reluctance is called for in the case of agency made rates—a fact alluded to in *SCRAP*, *id.* at 693, fn. 17. When the agency makes or prescribes a fare or rate it has done so after it has exercised its expertise

and has made a determination as to the reasonableness and lawfulness of the fare or rate. Judicial review of such orders is available in order to determine whether the agency complied with the statutory requirements.

In this case the agency had prescribed ratemaking standards after a very extensive investigation. It then proceeded to change such standards and prescribe new ones without notice and hearing. It is those standards and the procedures whereby they were adopted, which petitioners sought to have reviewed, not the suspension of the tariffs as such.

Thus the court below was not being asked to intrude into the agency's domain or make any determination as to the reasonableness of any fares. It was simply being asked to determine whether the Board in adopting new and modified ratemaking standards complied with the statutory requirements for notice and hearing and whether such standards conformed to the statute's "rule of ratemaking." Clearly those were questions for court review.

Neither *Arrow* nor *SCRAP* go so far as to suggest that questions of this kind involving statutory interpretation are insulated from judicial review simply because they happen to be encompassed within an order which the agency chooses to label a "suspension." In *Arrow*, this Court expressly limited its decision to the preclusion of the use of injunctions against an agency's exercise of its suspension power. 372 U.S. at 669. And in *SCRAP*, this Court refused to express its views on the broad question of whether "a decision of the Commission whether or not to suspend rates is not subject to judicial review." 412 U.S. at 698-99, fn. 22.

More recently this Court in *United States* v. *Chesapeake & Ohio Ry.*, 426 U.S. 500 (1976), once more had the opportunity to address itself to the reviewability of suspension orders. In that case the Interstate Commerce Commission had suspended rail rates, but agreed to lift the suspension if certain conditions were met. When challenged in the District Court the Commission argued that the suspension order was not reviewable. While agreeing that the suspension was not reviewable, the District Court held that it did have the power to review the portions of the order imposing the conditions. This Court in upholding the Commission's conditions did not question the reviewability of those portions of the suspension order which had imposed them. The situation in this case is the same; review was not sought of the suspension itself, but of those portions of the Board's orders which had adopted new and revised ratemaking standards.

The failure of the court below to differentiate between carrier made and agency made rates, its approval of the Board's misuse of its suspension powers and its refusal to review the unlawful ratemaking action of the Board, raise important issues in the administration of a key federal statute. The continuing importance of the issue is attested to by the fact that for two years now the Board has used its suspension powers to make rates without complying with the statutory procedures and standards required by the Act. Such statutory violations have caused the airlines to be deprived of hundreds of millions of dollars annually in needed fare relief.

If the decision of the court below is allowed to stand, judicial review of the important statutory questions posed by petitioners will forever be frustrated and evaded. Petitioners will have been effectively deprived of their day in court.

2. The Decision Below Conflicts With the Decision of Another Court of Appeals as to the Proper Interpretation of Section 1002(d) of the Federal Aviation Act.

The decision below has permitted the Board to "suspend" tariffs which the Board holds to be inconsistent with its prescribed fare orders and thus avoid judicial review, rather than to require it to "reject" such tariffs and thus face review. The Court of Appeals for the Seventh Circuit, when faced with a similar question, reached an opposite result in *United Air Lines, Inc.* v. *CAB*, 518 F.2d (7th Cir. 1975).

In *United*, the Board had prescribed fares for mainland-Hawaii markets and required the air carriers to conform their tariffs to such fares. After a brief period of conformance, United Air Lines filed tariffs for fares higher than those prescribed by the Board. The Board *rejected* the new tariffs, stating:

> "'Obviously, tariffs setting forth fares other than those found to be lawful fares thereafter to be charged must be rejected.'" (518 F.2d at 257).

United sought judicial review of the Board's orders, contending that it had the right to file a new tariff and thereby implicitly bring into play all of the ratemaking procedures of Section 1002 of the Act, including suspension and investigation.

The Court of Appeals for the Seventh Circuit rejected United's argument and upheld the Board's position as expressed in the *DPFI:*

> "'[W]e consider it established that the prescription of rates by the Board under Section 1002(d) is a legislative determination of rates thereafter to be charged by the carriers, and the rate order embodying this

> determination demands carrier compliance so long as it remains effective. Moreover, where, in the face of such a [sic] order, a carrier files new tariffs inconsistent with the rate order, we are of the conviction that the Board's power to reject such tariffs is implicit in the statutory plan, required as a matter of common sense, and is supported by a formidable body of case law.'" (518 F.2d at 258).

The court reviewed this Court's decisions in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932), *United States* v. *Corrick*, 298 U.S. 435 (1936), *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), and found that all supported the proposition that once a lawful rate is prescribed under the Federal Aviation Act, it is the rate that must be charged. Consequently, as the Board itself earlier stated, *supra*, p. 12, tariffs proposing other rates "[o]bviously . . . must be rejected," unless the rate orders are vacated or modified.

The decision of the Court of Appeals for the Seventh Circuit found that tariffs inconsistent with Board prescribed rate orders are subject to "rejection" and thus judicially reviewable; the decision below would permit such tariffs to be subject to "suspension" and thereby evade such review.

This Court should grant a writ of certiorari to resolve the clear conflict between the circuits.

3. The Decision Below on Mootness Conflicts With Decisions of This Court.

The decision of the court below in finding mootness because of the carriers' withdrawal of their suspended tariffs conflicts with decisions of this Court.

Despite the involuntary withdrawal of the carriers' tariffs, *supra*, p. 6, an actual controversy continues to

exist with a subject matter on which the judgment of the court can operate. *Lord v. Veazie*, 8 How. 251, 255 (1850); *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944); *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 (1964). The new and revised ratemaking standards which petitioners have challenged and sought to have reviewed are still very much alive today. They have now been applied on numerous occasions in the past two years to the rate proposals of the carriers, and continue to be applied. Fares continue to be suspended if they do not conform to the new and revised standards; only those fares which conform are permitted to become effective. Thus these standards are directly and continually responsible for a fare level below that to which the carriers are entitled under the Board's lawful *DPFI* standards. Even if the withdrawal of the tariffs rendered the matter technically moot, the case involves a recurrent question which would otherwise escape judicial review within the meaning of *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911).

CONCLUSION

For the reasons set forth herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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